

July 10, 2025

Hon. Ona T. Wang
Southern District of New York

In re OpenAI, Inc., Copyright Infringement Litigation, 25-md-3143 (SHS) (OTW)
This Document Relates To: News Cases

Dear Magistrate Judge Wang:

I write on behalf of News Plaintiffs in response to this Court’s July 9, 2025 Order, which addressed the parties’ dispute about OpenAI’s overuse of the “Attorneys’ Eyes Only” (“AEO”) designation. Dkt. 308. The Court asked News Plaintiffs to “respond to OpenAI’s latest proposal” and to “provide examples of AEO documents that do not specifically mention their organizations and explain why they should be able to show such documents to their clients.” *Id.* at 2.

I. OpenAI’s Latest Proposal Is Unworkable.

News Plaintiffs agree with the Court that OpenAI’s proposal is “unworkable.” *Id.* at 1. Requiring News Plaintiffs to first identify documents to OpenAI “is both overly restrictive, and unnecessary, and ultimately unproductive.” *Id.* at 1. Moreover, identifying a subset of documents would require News Plaintiffs to divulge their work product to OpenAI—namely, the documents that News Plaintiffs believe are most relevant to the claims and defenses in these cases, thus rewarding OpenAI’s improper use of confidentiality designations.

This dispute exists because OpenAI grossly overused the AEO designation. This Court has twice reviewed sample documents and expressed “concern” about OpenAI’s designations. *See* Dkt. 254 at 5 (“The Court is concerned that OpenAI may have overused the AEO designation.”); Dkt. 308 at 2 (noting “the Court’s concern with OpenAI’s overuse of the AEO designation”). News Plaintiffs attempted to craft the same solution it agreed to with Microsoft by proposing three specific carveouts (i.e. categories of AEO documents that will not be shared with the identified decisionmakers). News Plaintiffs made a proposal based on their understanding of the documents that OpenAI considers the most sensitive. News Plaintiffs have also – on multiple occasions – invited OpenAI to identify additional specific categories, but OpenAI has refused. *See* Dkt. 280-1 (emails between counsel). That is again a problem of OpenAI’s own making. If OpenAI wants to reconsider and identify additional specific categories before the Court’s July 11 deadline to submit final proposals, News Plaintiffs remain willing to consider them – but they cannot come up with these categories on their own.

The Court expressed concern that News Plaintiffs’ proposal “does not provide OpenAI any avenue by which to challenge disclosures of any particular document(s) before they are disclosed.” Dkt. 308 at 1. The solution here is to agree to very specific carveouts, as News Plaintiffs have repeatedly tried to do. These carveout categories will not be difficult to apply. For example, since News Plaintiffs and Microsoft reached a similar agreement earlier in discovery, which included a defined carveout for licensing documents, the parties have complied with the agreement without raising any concerns or disputes. The same would be true here. For example, there will not be any dispute about whether a document addresses enterprise pricing for ChatGPT, nor whether a

document relates to a third-party contract. News Plaintiffs will comply with the agreed categories, as they have for the Microsoft agreement. This approach should assuage OpenAI's concerns while also protecting News Plaintiffs from having to divulge their work product to OpenAI.

II. Examples of Improperly Designated AEO Documents that Do Not Specifically Mention News Plaintiffs' Organizations

The Court observed that “some of the AEO documents already presented to the Court under seal do not mention particular Plaintiffs at all, but also do not seem to merit an AEO designation.” Dkt. 308 at 2 (citing examples of documents). News Plaintiffs agree. Here are more examples of such documents:

Exhibit 1 is an internal OpenAI slack thread, dated October 19, 2021, where an employee admits that OpenAI [REDACTED]

Exhibit 2 is an internal OpenAI slack thread, dated November 11, 2023, [REDACTED]

Exhibit 3 is an internal OpenAI slack thread, dated October 25, 2020, where an employee acknowledges that [REDACTED]

Exhibit 4 is an internal OpenAI email, dated August 2, 2023, where an employee concedes [REDACTED]

Exhibit 5 is an internal OpenAI email, dated October 5, 2019, where an OpenAI employee admits: [REDACTED]

While these documents do not reference any News Plaintiff, they are nonetheless highly relevant to the claims and defenses in this case. These documents undermine OpenAI's fair use defense, prove that OpenAI willfully infringed copyrights, and Exhibit 1 also undermines OpenAI's statute-of-limitations defense.

News Plaintiffs reasonably seek to share documents like these with their client decisionmakers, including to inform their clients about the progress of the litigation. Had OpenAI properly designated these documents, News Plaintiffs would be able to share them with the identified decisionmakers, all of whom are authorized to view “Confidential” information. These documents come nowhere close to meeting the AEO standard. Disclosing them to a small number of News Plaintiffs’ decisionmakers would not “create a substantial risk of serious harm” to OpenAI. Dkt. 305 at 8.

Furthermore, News Plaintiffs expect that this issue will persist, as OpenAI continues to produce documents. At the January discovery conference, OpenAI agreed to review approximately 667,000 additional documents to resolve News Plaintiffs' motion to compel OpenAI to apply additional custodial search terms. *See* January 22, 2025 Tr. at 62:4-13. Since then, OpenAI has produced only 26,971 documents, which indicates that a substantial number of documents have

yet to be produced. OpenAI previously reported a 25% responsiveness rate for its document productions. *Times* Dkt. 308. Applying that rate, OpenAI should be producing well over 100,000 additional documents, which will only exacerbate the over-designation problem.

Given OpenAI's excessive overuse of the AEO designation, as further illustrated through the above examples, it would be appropriate to order OpenAI to re-review all of its AEO documents and to substantially decrease its AEO designation rate. But the better path is to reach an agreement, and News Plaintiffs will seek to do so before the Court's July 11 deadline for submitting final proposals.

Respectfully,

/s/ Davida Brook
Davida Brook
Susman Godfrey LLP
News Plaintiffs' Liaison Counsel

cc: All Counsel of Record (via ECF)